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STATE OF MICHIGAN

IN THE SUPREME COURT

TERIDEE LLC, a Michigan limited liability company; THE JOHN F. KOETJE TRUST, u/a/d 5/14/1987, as amended; and THE DELIA KOETJE TRUST, u/a/d 5/13/1987, as amended,

Plaintiffs/Appellees,

v

CLAM LAKE TOWNSHIP, a Michigan municipal corporation; and HARING CHARTER TOWNSHIP, a Michigan municipal corporation,

Defendants/Appellants.
_____/

Supreme Court Docket No. 153008

Court of Appeals Docket No. 324022

Wexford County Circuit Court
Case No. 13-24803-CH

Hon. William M. Fagerman

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APPELLANTS' REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

[There is another appeal between some of these same parties, arising out of the same transaction, which is now pending before this Court in Supreme Court Docket No. 151800]

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Appellants, Clam Lake Township and Haring Charter Township (collectively, "Townships"), file this Reply Brief, as authorized by MCR 7.302(E), in further support of their Application.

REPLY TO APPELLEES' COUNTERSTATEMENT OF FACTS

As global observation, it seems that Appellees have forgotten which appeal they are briefing.[1] This particular appeal presents the narrow issue of whether the design standards of the Townships' 2013 Act 425 Agreement constitute an unlawful restriction on Haring's legislative zoning authority, and if so, whether they are severable. But Appellees nonetheless devote the vast majority of their purported counter-statement of facts to other irrelevant matters, such as the SBC proceedings on the Townships' 2011 Agreement (which doesn't even exist anymore); whether the Townships' Agreement interferes with annexation (not relevant here); and e-mails that a neighborhood gadfly (George Giftos) sent to the neighborhood opposition group and copied to a Township Supervisor (also not relevant here).[2] The Court should disregard this meaningless chaff.

Appellees are also attempting to deliberately mislead the Court about the Board members' deposition testimony. A cute "trick" that Appellees are trying to play is to cite isolated, out-of-context testimony, to the effect that Haring is not required, by the Agreement, to provide "any utilities to any property in Clam Lake." Answer at pp. 15-16. This is a "trick," and not an honest presentation of the testimony, because Appellees are purposefully omitting the predicate explanation that always preceded this particular line of deposition questioning, which was that the Transferred Area is *not* considered a part of Clam Lake (i.e., it has been transferred to Haring under the Agreement). Thus, the only thing the Board members were saying is that, *except for the Transferred Area*, the Agreement does not require Haring to extend sewer/water services to *other* areas of Clam Lake, such as the Clam Lake DDA or to the Berry Lake area. COA Brief at Exb. 23, Mackey Dep at

[1] More specifically, Appellees seem to have forgotten that they are not briefing S. Ct. Docket No. 151800.

[2] The Court will observe the subtle non-truth that Appellees are attempting to perpetuate here, by falsely claiming that the Supervisor "exchanged" e-mails with Mr. Giftos. Mr. Giftos' e-mail was a *one-way* communication with a neighborhood opposition group of 32 residents, which he copied to the Supervisor. Answer at Exb. B. The Supervisor ignored the e-mail, and thus never "exchanged" anything with Mr. Giftos.

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pp. 20-21 (referring only to the Clam Lake DDA District, not to the Transferred Area); *id*. at Exb. 29, McCain Dep at pp. 12-13 (referring to "other areas of Clam Lake" outside of the Transferred Area); *id*. at Exb. 24, Kitler Dep at pp. 25-26 (explaining that Haring sewer/water is required to go to the Transferred Area, but that there is no guarantee that it would go to the DDA or to Berry Lake); *id*. at Exb. 30, Soule Dep at pp. 18-20 (referring to service "outside of the transferred area").

But that is not the case for the Transferred Area, which, as Appellees expressly admit, is "required" to receive Haring sewer/water services under the terms of the Agreement. *See* Pls' Amd Compl at ¶¶57-59. Indeed, so adamant are Appellees in their insistence that the Agreement "requires" Haring to provide water and sewer service to the Transferred Area that they allege that this requirement actually constitutes an unlawful restriction on Haring's legislative authority over its utilities. *Id*.[3] Consistent with Appellees' binding admission on this point, the Board members expressed the near unanimous position that Haring's requirement to extend sewer and water services to the Transferred Area was *the* central reason for entering the Agreement. COA Brief at Exb. 20, Payne Dep at p. 35; *id*. at Exb. 22, Rosser Dep at p. 6; *id*. at Exb. 23, Mackey Dep at pp. 6-7, 21-22; *id*. at Exb. 24, Kitler Dep at p. 7; *id*. at Exb. 25, Wilkinson Dep at p. 18; *id*. at Exb. 26, Whetstone Dep at pp. 9-10, 12; Exb. 27, *id*. at Baldwin Dep at p. 7; Exb. 28, *id*. at Fagerman Dep at pp. 8-10, 11-12, 15, 16; *id*. at Exb. 30, Soule Dep at pp. 8-9; *id*. at Exb. 31, Scarbrough Dep at p. 28.

Another misrepresentation of deposition testimony appears later in Appellees' Answer, where they allege that three Board members (Soule, Baldwin and McCain) testified that the zoning requirements of the Agreement are binding on Haring. Answer at p. 35. This is just another cute

[3] Herein lies the un-reconcilable conflict presented by Appellees' position. Their Amended Complaint expressly admits that the Agreement "requires" Haring to provide water/sewer service to the Transferred Area (Pls' Amd Compl at ¶¶57-59), yet Appellees simultaneously argue that the Agreement is illusory because it doesn't require Haring to provide water/sewer to the Transferred Area. They can't have it both ways.

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"trick"[4]. The "trick" being played in this instance is to ignore the fact that Appellees' counsel, when deposing the Board members, was improperly asking the Board members to read only a few select words of the Agreement in isolation, and to then demand an answer about what those words mean, in isolation. Specifically, Board members were asked to read isolated portions of Art. I, §6.a.1 or §6.a.2 of the Agreement, and then asked whether those select words required Haring to adopt certain zoning provisions or approve a certain development proposal. *See* e.g., COA Brief at Exb. 27, Baldwin Dep at p. 12:10-24, p. 14:13-17, and p. 15:20-23; *id*. at Exb. 30, Soule Dep at p. 58:8-17.

But if Appellees were to be forthright with the Court, they would acknowledge that 10 of the 12 Board members testified that, when reading the Agreement *as a whole*, with Art. I, §6.c taken into account, the proper interpretation is that Haring retained its legislative authority to determine the final content of the zoning regulations that can be applied to the Transferred Area. COA Brief at Exb. 3, Payne Dep at pp. 26-29; *id*. at Exb. 4, Peterson Dep at pp. 13-14; *id*. at Exb. 5, Rosser Dep at pp. 9-10; *id*. at Exb. 7, Kitler Dep at pp. 8-9; *id*. at Exb. 8, Wilkinson Dep at pp. 44-45; *id*. at Exb. 9, Whetstone Dep at pp. 7-9; *id*. at Exb. 10, Baldwin Dep at p. 28; *id*. at Exb. 11, Fagerman Dep at pp. 11, 27-28; *id*. at Exb. 13, Soule Dep at pp. 47-49; *id*. at Exb. 14, Scarbrough Dep at pp. 6-8.

REPLY ARGUMENTS

I. APPELLEES' ARGUMENTS ARE PREDICATED ON AN AGREEMENT THAT DOES NOT EXIST ANYMORE

Appellees' entire argument is predicated on a form of Act 425 agreement that no longer exists, and which has not existed since October 21, 2013. More specifically, Appellees' entire argument is predicated on the Townships' *original* Act 425 Agreement, which, as the Townships' have already admitted (Application at pp. 7-8), could have been construed as requiring Haring to adopt (at least initially) specified mixed-use PUD regulations into its zoning ordinance. But it is

[4] The only exception is Trustee McCain, who, as the Township has admitted, is the sole Board member who erroneously believed that the design standards of the Agreement are binding on Haring.

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undisputed that that particular Agreement no longer exists. It was replaced with the First Amended Agreement on October 21, 2013, which swapped out and replaced the original PUD design standards with materially-different PUD design standards that Haring had already independently developed and adopted, *before* the First Amendment became effective, such that the Amended Agreement requires Haring to do *nothing*, insofar as adopting specified PUD standards is concerned. Application at pp. 7-8, 28-31. This fundamental change from the original Agreement, when coupled with Haring's continuing authority, under Art. I, §6.c, to amend the zoning standards for the Transferred Area, results in an undisputed factual context where Haring has the unilateral and unfettered authority to determine the PUD standards that can be applied to the Transferred Area.

But Appellees just ignore these dispositive facts, and instead repeat the wooden mantra over and over again, that the *original* Agreement required Haring to adopt specified PUD design standards. *See*, e.g., Answer at pp. 4, 20, 21, 31, 35, 36. Nowhere is this fatal error made more evident than at pages 35-37 of Appellees' Answer, where Appellees attempt to show that the design standards of the Agreement unlawfully bind Haring by pointing to certain e-mails and letters from the Township attorney, which made reference to Haring being "constrained" by the minimum PUD standards of the Agreement. Answer at Exbs. K-M. But what Appellees are ignoring is the fact that these items were drafted in the April-May, 2013 timeframe (*id*.), and were thus commenting only on the *original* Agreement, which no longer exists. And so the cited correspondence of the Township attorney does nothing more than confirm exactly what the Townships have already stated in their own pleadings, to wit, that the *original* Agreement could have been construed as requiring Haring to adopt (at least initially) certain PUD standards in its zoning ordinance. But that has nothing to do with the *Amended* Agreement that was actually in effect at the time of the lower court decisions, which undisputedly does not require Haring to adopt any specified PUD standards whatsoever.

But it is of no surprise that Appellees have continued to ply the Court with this exact same

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strategy, of relying on an agreement that no longer exists. Appellees have been successful in pulling the wool over the eyes of two lower courts already, whom inexplicably failed to even mention the legally dispositive fact that Art. I, §6.a.2 of the *Amended* Agreement requires Haring to do nothing. Having succeeded with this same strategy twice already, Appellees apparently believe that the same deception will work in this Court. It should not succeed; reversal is required.

II. APPELLEES WANT THE COURT TO REWRITE THE AGREEMENT

In the Court of Appeals proceedings, the Townships pointed out a fatal error in the circuit court's reasoning: the circuit court held that Art. I, §6.c of the Agreement could not have the meaning ascribed to it by the Townships[5], which thereby rendered Art. I, §6.c nugatory and mere surplusage – having no meaning at all. Appellants' COA Brief at p. 35-36. The Court of Appeals rightly corrected the circuit court on this point, holding that Art. I, §6.c allows Haring to "amend" the zoning regulations that could be applied to any or all portions of the Transferred Area. Application at Exb. 2, slip op at p. 4 (holding that, under Art. I, §6.c, "Haring may later amend its zoning ordinance over the transferred area.").[6]

Appellees now attempt to resurrect the circuit court's errant thinking on this point, by arguing that Art. I, §6.c actually has another meaning. Appellees, as strangers to the Agreement, theorize that Art. I, §6.c means that Haring can subsequently amend the provisions of its zoning ordinance, "except . . . the zoning restrictions and regulations in Article I, Section 6." Answer at p. 24 [emphasis in original]; *see* also, *id*. at pp. 31-32. The Court should query from whence this particular "excepting" language might come from, because it does not appear in the Agreement. Appellees are thus asking the Court to re-write and supplement Art. I, §6.c so that it reads as follows:

[5] Specifically, that Art. I, §6.c allows Haring, by subsequent amendment of its zoning ordinance, to determine the final content of the zoning regulations that apply to the Transferred Area.

[6] Appellees misrepresent the Court of Appeals' holding on this issue, by purposefully omitting that portion of the opinion that expressly recognizes Haring's authority to later amend the zoning for the Transferred Area. *See* Answer at p. 24.

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> After such amendments to the Haring zoning ordinance, and for the Duration of the Conditional Transfer, the Transferred Area shall be subject to Haring's Zoning Ordinance and building codes as then in effect or as subsequently amended, ***except those amendments that might be different from those stated in Article I, Section 6***. [added language in bolded italics].

But that is not what Art. I, §6.c says. Instead, the plain language of Art. I, §6.c preserves to Haring the *unqualified* power to make the Transferred Area subject to "subsequent amend[ments]" to its zoning ordinance, without any limitation stated in the Agreement whatsoever. Because the Court is without authority to re-write the Agreement[7], Appellees' interpretation of Art. I, §6.c must be rejected. In accordance with firmly established Michigan law, the Court is required to prefer and give effect to an interpretation which (a) flows from the plain, *unqualified* language of Art. I, §6.c and, (b) renders the Agreement lawful. To that end, the Townships' interpretation must prevail.[8]

That said, the Townships do appreciate the drafting advice from Appellees, to wit, that they would have drafted Art. I, §6.c more explicitly, so as to state that Haring is "not bound by the specific zoning requirements in Article I, Section 6." Appellees' Brief at pp. 23-24. Perhaps that's a good idea. But it's an immaterial idea, insofar as this appeal is concerned. The Court is not here to decide who has a better idea for preserving Haring's authority to amend its zoning ordinance. That same goal can be accomplished by any number of drafting choices. By way of analogy, the Court can consider a hypothetical situation where person "A" is driving north, and person "B" wants to tell "A" to take a left turn. This could be accomplished by any number of commands, such as: "turn directly left"; "change course to west"; "bear 90° left"; "turn to a compass heading of 270°"; or "turn

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[7] *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199-200; 747 NW2d 811 (2008).

[8] Appellees are making a material misrepresentation to the Court, when they allege that the Townships "do not dispute" that the Haring zoning ordinance requires Haring to apply the more stringent PUD standards "*in the Act Agreement*" over any less stringent PUD standards of the zoning ordinance. Answer at pp. 22-23. That is false; the Townships have never adopted that incorrect interpretation. Instead, as the Townships have expressly pointed out (Application at p. 35), Section 422.3(g) of the Haring zoning ordinance states that the mixed-use PUD standards ***of the zoning ordinance*** (i.e., *not* of the Agreement) shall prevail over any less-stringent general PUD design standards of the zoning ordinance. And because Haring has the authority, under Art. I, §6.c of the Agreement, to determine the final content of the mixed-use PUD standards of its zoning ordinance, Haring is thus not bound to apply the mixed-use PUD standards of the Agreement.

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directly to port." The level of clarity achieved by any one of these stylistic choices is certainly a debatable subject. But at the same time, it cannot be denied that any one of them still takes you to the same place: left. And the same reasoning also applies to the stylistic drafting choice made by the Townships, as compared to the choice Appellees would have made. It can be said either that:

- "The Transferred Area is subject to subsequent amendments to the Haring Zoning Ordinance," as the Townships decided; or,
- "Haring is not bound by the specific zoning requirements in Article I, Section 6," as Appellees would prefer.

But just like in the above analogy about turning left, either option still takes you to the same place – Haring still has the legislative authority to determine the final content of the zoning regulations that apply to the Transferred Area, by way of amending its zoning ordinance. And Appellees gain no ground against this conclusion by repeating (at least seven times) the *ipse dixit* that the Townships' interpretation is either illogical, irrational, untenable, or lacking commonsense. Answer at pp. 23, 24, 25, 30, 32, 38. In this respect, it appears that Appellees have not asked themselves the most obvious of questions: "Why it is illogical, irrational or nonsensical for the Townships to have drafted their Agreement in a manner that complies with Michigan law, by including a provision that preserves Haring's final zoning authority over the Transferred Area?" Isn't this exactly what municipalities should strive to do – to enter legal agreements?

That's what the Townships did; they intentionally included Art. I, §6.c to ensure that the Agreement complies with Michigan law, by preserving to Haring its authority to determine the final content of the zoning standards that could apply to the Transferred Area. They did this by expressly preserving Haring's right to make the Transferred Area subject to *all* subsequent amendments to the Haring zoning ordinance, without any limitation whatsoever. That is the proper and lawful interpretation of Art. I, §6.c, and it is the interpretation that requires reversal of the lower courts.

III. THE *INVERNESS* CASE IS INAPPOSITE

Appellees rely heavily on *Inverness Mobile Home Comm, Ltd v Bedford Twp*, 263 Mich App

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241; 687 NW2d 869 (2004), as a means of attacking Art. I, §6.a.2 of the Agreement. Answer at pp. 28-30, 41, 43. They argue that *Inverness* is on point and mandates a finding that the Agreement is invalid, as constituting illegal contract zoning. *Id*. In a very important respect, *Inverness* is just plain wrong.[9] But the Townships will nonetheless demonstrate below that it is entirely inapposite.

As a threshold matter, *Inverness* is not even implicated by the Townships' Agreement because, as demonstrated above, Haring is *not* contractually bound by the design standards of Art. I, §6.a.2. Thus, there is no contract zoning to be concerned with, in the first instance. And the "shall be zoned" language of Art. I, §6.a.2 does not change this conclusion. The problem with attempting to apply *Inverness* to the "shall be rezoned" language of Art. I, §6.a.2 is that *Inverness* does not address the unique subject matter of PUD rezoning, which is the *only* type of rezoning that Art. I, §6.a.2 addresses. This distinction is pivotal because, as already discussed in the Application, PUD rezoning is subject to a special set of statutory rules, whereby the Legislature has expressly declared and mandated that a municipality is *required* to approve ("shall approve") a PUD application that complies with the standards of the zoning ordinance. *See* MCL 125.3504(3).

And importantly, that is the *only* situation in which the "shall be rezoned" language of Art. I, §6.a.2 would be implicated. This is so because the closing words of Art. I, §6.a.2 make clear that the "shall be zoned" language would be triggered only if an applicant submitted a fully-compliant PUD application (i.e., an application that complies with the *amended* minimum PUD requirements which Haring has now adopted into its zoning ordinance, under the authority of Art. I, §6.c). Thus, Art. I, §6.a.2 simply requires Haring to do exactly what the law already requires it to do: to approve a PUD application that fully complies with its zoning ordinance. MCL 125.3504(3).

The *Inverness* case has nothing to do with a PUD, and so the court in that case did not have

[9] *Inverness* holds that adoption of a master plan is a "legislative" act. *Id*. at p. 249. It is not. *See Cole's Home & Land Co, LLC v. City of Grand Rapids*, 271 Mich App 84, 91; 720 NW2d 324 (2006); *see also*, MCL 125.3843(3) (allowing master plan to be adopted by an administrative body having no legislative power). A master plan is a non-binding guidance document, and thus lacks the *sine qua non* of a legislative act.

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occasion to even consider MCL 125.3504(3), nor its Legislative mandate that a fully-compliant PUD application "shall be approved." And there is absolutely nothing in *Inverness* to suggest that MCL 125.3504(3) is invalid or that a municipality is not bound by the mandatory PUD-approval language included therein. Therefore, it is entirely inapposite in relation to the Agreement.

IV. ART. I, §3 OF THE AGREEMENT SATISFIES ACT 425

In their Application, the Townships demonstrated that the Act 425 Agreement would still be valid if the design standards of Art. I, §6 were severed, because Art. I, §3 of the Agreement (which Plaintiffs' Amended Complaint does not even challenge) independently has the purpose of a planned economic development project, in compliance with Act 425. Application at pp. 43-47. Appellees incorrectly argue that the Townships have raised this issue for the first time on appeal. Answer at p. 49. That is false. In the trial court, the Townships argued that Art. I, §3 is *the* provision of the Agreement that has the purpose of a planned economic development project, while Art. I, §6.c simply gives Haring the final authority to fill-in the final details of how the Transferred Area is to be zoned and regulated.[10] Thus, the issue was expressly raised and preserved in the trial court.

Appellees also incorrectly argue that Art. I, §3 cannot independently satisfy Act 425 because a conditional transfer agreement must "establish" an economic development project, which Appellees claim Art. I, §3 does not do. Answer at p. 49. They are wrong on at least two scores. As a principal matter, the word "establish" does not appear anywhere in Act 425. Instead, the statute merely requires that an agreement have the "purpose of an economic development project." MCL 124.22(1). Moreover, an "economic development project" is itself defined by the statute as a "*planned* improvements," meaning a project that is not already established. Art. I, §3 of the Agreement, by itself, satisfies these statutory requirements because (a) it expressly identifies the purpose of the Agreement as being for a particular type of mixed-use residential/commercial

[10] *See* Defs' Response in Opp to Pls' Motion for Leave to File Supp. Brief at pp. 4-5 (filed 8/15/14).

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development, and (b) it identifies the type of improvements that will facilitate that type of mixed-use development, by planning for the extension of Haring sewer/water services to the Transferred Area. This is a textbook example of a valid economic development project under Act 425.

And Appellees are being more than a little disingenuous when they attempt to diminish the significance of Art. I, §3 by alleging that the Townships characterized the *entirety* of amended Art. I, §3 as being only a "minor change" to the Agreement. Answer at p. 50. In truth, Art. I, §3 has always been a central part of the Agreement, in nearly the identical form, since the Agreement's original inception. Application at Exbs. 3 and 4. The "minor change" that the Townships mentioned in their Court of Appeals brief is only that minor amendment which added an explicit reference to the *Corridor Study*, in the Second Amended Agreement (*id*. at Exb. 5). That particular amendment is properly characterized as "minor" because the Townships had already agreed, over a decade ago, that the design standards of the *Corridor Study* should apply to Transferred Area (*id*. at Exb. 8). But that does not diminish the legal fact that Art. I, §3 has always been the central part of the Agreement that has the purpose of an economic development project, in satisfaction of Act 425. For that reason, the Agreement is valid, even if the design standards of Art. I, §6 are severed.

REQUEST FOR RELIEF

For the additional reasons stated herein, the Townships respectfully request that this Honorable Court grant the Application, reverse the lower courts, hold that the Agreement is valid and enforceable, and hold that annexation of the Transferred Area is thus prohibited by MCL 124.29.

Respectfully submitted,

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Dated: February 16, 2016

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